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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1204

FRASER & JOHNSTON COMPANY, a corporation,
Petitioner,

vs.

LODGE 1327,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The petitioner, FRASER & JOHNSTON COMPANY, a corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion rendered in this action on December 22, 1971 by the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported. It is reprinted in Appendix A hereto, p. 1A, *infra.*

JURISDICTION

The opinion of the Court of Appeals was rendered on December 22, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a party to a labor dispute, having filed unfair labor practice charges with the National Labor Relations Board and having had such charges fully and finally adjudicated by the Board is also thereafter entitled to arbitration of the same dispute.

2. Whether in the posture of this case, the Board having adjudicated the dispute prior to arbitration, the Board's exclusive jurisdiction makes its decision supreme under the doctrine of preemption.

3. Whether the grant of summary judgment was improper where there is a genuine issue of material fact as to whether the collective bargaining agreement under which arbitration is sought was intended to apply to petitioner's new plant located twenty-six miles distant to which it had relocated when the new plant was under the jurisdiction of another union.

4. Whether the defense of laches raised by petitioner was an issue for decision by the court and could not be properly left for disposition by the arbitrator.

STATEMENT OF THE CASE

Petitioner, an employer, was engaged in manufacturing in San Francisco. The dispute between petitioner and respondent arose after negotiations between the parties relating to relocation of petitioner's plant approximately 26 miles distant from San Francisco failed to produce a result satisfactory to respondent. Respondent instituted an action in the United States District Court for the Northern District of California under 29 U.S.C. § 185 and 28 U.S.C. § 2201 seeking an injunction, damages and declaratory relief based upon a collective bargaining agreement which covered its members working in petitioner's San Francisco plant. In the Second Count of that Complaint, respondent alleged that petitioner's actions, in addition to being in violation of the collective bargaining agreement, also constituted unfair labor practices under the Labor Management Relations Act of 1947, including an alle-

gation of refusal to bargain in good faith. Respondent also alleged in this count that the matters which it complained of were *"not subject to the grievance procedure of the collective bargaining agreement."* The following day respondent also filed an unfair labor practice charge with the National Labor Relations Board alleging as it did in the complaint that petitioner had violated certain sections of the National Labor Relations Act, including an allegation that petitioner had failed to bargain in good faith.

Respondent subsequently amended its complaint in the instant action by adding a Third Count praying for an order compelling petitioner to proceed forthwith to arbitration of the same dispute which was the subject of both the complaint in the instant action and of the unfair labor practice charge. Respondent failed to follow the grievance procedure called for in the collective bargaining agreement in that it did not comply with the four steps of grievance processing required as a prerequisite to arbitration. Nevertheless, on August 22, 1969, the District Court granted respondent's Motion for Summary Judgment and ordered petitioner to proceed to arbitration. The District Judge expressing doubt as to the rule of law on the issues and expressing a hope that an appeal would be taken, ordered a stay of the judgment pending appeal to the Court of Appeals.

An appeal from the Summary Judgment was taken to the court below. While that appeal was pending, the Board determined the charges raised by respondent and ordered various remedies, including, *inter alia,* reinstatement, back pay, and bargaining with respondent. The court below considered the appeal in the instant case and affirmed the District Court's grant of Summary Judgment.

REASONS FOR GRANTING THE WRIT

This case presents four major issues, the disposition of each of which by the court below conflicts with prior decisions of this Court, decisions of other Courts of Appeal, and which has

widespread, immediate and adverse impact nationally upon the resolution of labor disputes. These reasons will become apparent as the issues are discussed in turn.

1. The Issues of Arbitration of a Dispute After a Board Determination and the Board's Preemptive Jurisdiction.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, (1959), established the general principle that the National Labor Relations Act ("the Act") preempts state and federal court jurisdiction to remedy conduct arguably protected or prohibited by the Act. That principle has been upheld and explained by the Court most recently in *Amalgamated Ass'n. of St., E. R. and M.C. Emp. v. Lockridge*, 91 S.Ct. 1909 (1971). In that action, the Court held that the Act preempts state court jurisdiction over disputes between a union and one of its members wherein the latter complained the union had wrongfully deprived him of his employment. In so holding, this Court restated the policy behind the conferring of exclusive jurisdiction in the National Labor Relations Board:

> ". . . The principle of preemption that informs our general national labor law was born of this Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes in order to preclude, so far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme."
>
> ". . . Congress in establishing overriding federal supervision of labor law 'did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision *** Congress evidently determined that centralized administration of specially designed procedures was nec-

essary to obtain uniform application of it substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies *** *A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.'"*

****

"The rationale for preemption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system *in the hands of an expert administrative body rather than the federalized judicial system.*" *Id.* at 1918. (Emphasis supplied, footnote omitted.)

Thus, jurisdiction to decide this dispute lies solely with the Board which, it should be noted, has already decided the issues in respondent's favor. While the Court has held that in certain cases the courts may have jurisdiction pursuant to Section 301 of the Taft-Hartley Act (29 U.S.C. 185) to decide cases even in the presence of unfair labor practice charges, this principle is "applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." *Id.* at 1925. The instant dispute arises over respondent's charges that petitioner was not bargaining in good faith when the parties discussed the plant relocation. This Court has previously held that cases involving alleged refusals to bargain in good faith are within the domain of the Board and not the courts or an arbitrator. *NLRB v. Strong*, 393 U.S. 357 (1969).

Moreover, there is no precedent for a court determination ordering arbitration in a case where the Board *has already decided the matter*. To do so "does not further but rather frustrates real-

ization of an important goal of our national labor relations policy." *Boy's Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241 (1970). The policy of centralized administration to avoid "incompatible or conflicting adjudications" and the constitutional principle of preemption "to avoid conflicting regulation of conduct," both of which were recognized by the Court in *Lockridge* will be thwarted in the instant case.

Finally, the Act, Section 160(a) (29 U.S.C. 160(a)) provides:

> " 'The Board is empowered *** to prevent any person from engaging in any unfair labor practice ***. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.' "
>
> ****
>
> "[I]n no case has the Court directed the Board to defer to an arbitration award." *National Labor Relations Board v. Horn and Hardart Co.*, 439 F.2d 674, 678-79 (2d Cir. 1971).

Clearly, the Act, this Court's prior decisions and national labor policy dictate a reversal of the summary judgment requiring arbitration.

Absent such a reversal, the parties and the courts will face the problems inherent in having arbitration *after* the Board has decided the very issues sought to be arbitrated. The Board's ruling takes precedence over an arbitrator's award. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964). The court below suggested that if an arbitration award goes beyond the Board's decision, the Board may nevertheless adopt it. (Appendix, p. A5) However, there is no process by which the Board's and arbitral decisions can be reconciled after the Board has ruled. The important fact overlooked by the court below is that all of the decided cases which it cites and which respondent relies on, dealt with arbitration which occurred prior to any Board decision. None of them involved the precise situation here. If the respondent is dissatisfied

with the Board's decision, its proper recourse is to the appellate[1] and not the arbitral process.

The court below misconstrued the applicability and effect of this Court's decision in *Carey v. Westinghouse, supra.* There, the Court found that a controversy over which workers in two bargaining units should perform certain work was not within the jurisdiction of the Board and was therefore properly arbitrable. Moreover, the Court noted only that the Board "shows deference to an arbitral award" if a matter *first* the subject of arbitration later comes before the Board. This is no authority for the converse that the Board can and will defer to an arbitral award made *after* the Board's decision. In fact, given that the Board's ruling takes precedence, it is highly unlikely that the Board would change its decision and order even if there was a procedure by which that arbitral award could be brought to the Board.

Most recently, the Board has indicated that it will, in certain cases, dismiss a complaint where arbitration is available retaining jurisdiction only to assure the resolution of the matter in a procedurally fair manner consistent with the Act. *Collyer Insulated Wire,* 192 N.L.R.B. No. 150 (1971). For purposes of this case, there is no need to discuss whether the Board may properly so decline jurisdiction. There the dispute arose solely over a unilateral interpretation of the contract. In the instant case, the dispute arose over an alleged lack of good faith in bargaining, which is an issue that the Board should properly decide. *N.L.R.B. v. Strong, supra.* However, insofar as *Collyer* is an expression by the Board of its view that it has the power to defer to arbitration, it militates against the order to arbitrate in this action. When the Board decided the merits of the instant case, it implicitly rejected that possibility. Thus, absent this Court's review of the matter, the parties and many others will be faced with the threat of inconsistent determinations in the same action and interminable litigation, as the Board will be asked, probably futilely, by some unknown

1. 29 U.S.C. 160(f)

and unavailable procedure to accept the arbitral award and the matter will once again go to the appellate courts. Alternatively, enforcement of both the Board's and the arbitral awards can be sought with even greater confusion.[2] This Court has long recognized that "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting

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2. Once the Board has finally adjudicated the charges and moved to seek enforcement of its decision and order in the Court of Appeals, as it has done in this case, there is no statutory or administrative procedure for the parties to bring the arbitral award to the Board for review. The following results are realistically possible:

1. The arbitrator decides the case while the enforcement procedure is pending undecided in the Court of Appeals:

(a) The appeals court can enforce the Board's order without considering the arbitral award. If a party then seeks confirmation of the arbitral award in the District Court, that court must confirm the arbitral award absent fraud, corruption, partiality, misconduct, misbehavior, or an act in excess of the arbitrator's powers (9 U.S.C. §§ 9-10), resulting in two inconsistent orders to be reconciled by yet another appellate review.

(b) The appeals court can deny enforcement of the Board's order without considering the arbitral award. If a party seeks confirmation of an arbitral award in a District Court, that court must confirm the award (absent the exceptions listed above), thus engendering a certain appeal.

(c) The appeals court might, although there is no precedent for it, remand the case to the Board to consider the arbitral award. However, the Board has, by its decision and order herein, determined implicitly not to defer to the arbitral process and has ordered the remedy that it deemed appropriate. Thus, any such remand will probably go back to the Court of Appeals for a decision on the Board's order. Thus, litigation goes on. The basic policy of the Act, which is to stabilize labor relations is thereby frustrated.

2. The Court of Appeals orders enforcement of the Board's order. If the arbitrator thereafter decides the case:

(a) If the remedy award is greater than that of the Board, respondent may seek confirmation of that award in the District Court, but under *Carey v. Westinghouse, supra,* the Board's order takes precedence.

(b) If the award is more favorable to petitioner than that of the Board, should petitioner desire to request the Board to defer to the arbitrator, it is confronted with the fact that there is no procedure for doing so.

(c) If the Board and arbitral awards are the same, the parties have spent precious time needlessly and borne heavy litigation costs for no purpose.

adjudications as are different rules of substantive law." *Garner v. Teamsters, Chauffeurs & Helpers, Etc.*, 346 U.S. 485, 490-91 (1953).[3]

This Court's guidance is needed to explain its earlier decisions and to avoid the results of this case, which can only be interminable litigation detrimental to the interests of the parties, the courts and labor peace.

2. The Improper Grant of Summary Judgment.

The court below upheld the District Court's grant of summary judgment compelling petitioner to proceed to arbitration on the ground that "'[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage.' *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-82 (1960)." However, that case merely establishes a presumption that can be overcome by evidence showing that the intent of the parties to the contract was to the contrary. *Cf.* Note, "Labor Injunctions, *Boy's Markets* and The Presumption of Arbitrability," 89 *Harv.L.Rev.* 636, 637 (1972). If the reply affidavits of the non-moving party raise issues of fact, it is entitled to a trial on the merits despite the existence of a presumption. *Baker v. Hoey*, 33 F.Supp. 799, 801 (S.D.N.Y. 1940).

Federal Rule of Civil Procedure 56 allows the grant of summary judgment only when the moving party "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As this Court has said, "Rule 56 authorizes summary judgment only where the

3. The decision of the court below has given rise to much critical comment by members of the Bar who specialize in labor-management relations and by arbitrators.

moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627-28 (1944). "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." *Associated Press v. United States*, 326 U.S. 1, 6 (1945). In the instant case, there is a genuine issue of material fact, *viz*: the intent of the parties as to whether the collective bargaining agreement was intended to apply only to the San Francisco plant and not to the new location, a distance of 26 miles away, and over which another union had jurisdiction. If the agreement applied only to the San Francisco plant, it expired with the move out of that plant, and when it expired, so did the arbitration clause. Thus, in the absence of a collective bargaining agreement in force and effect, there can be no claim which on its face is governed by the contract. Such an issue can be resolved only at a trial wherein the court can have the benefit of oral testimony and other evidence. Whether or not the relief sought is an order to compel arbitration, the basic principles that govern the grant or denial of summary judgment are applicable. The presence of a presumption does not do away with petitioner's right to a trial on the merits and the court's grant of summary judgment was improper. See 6 *Moore's Federal Practice*, ¶ 56.17(6), and cases cited therein.

In dealing with the question of intent raised in the motion for summary judgment, the Second Circuit has said:

> "The District Court must therefore take that view of the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all favorable inferences that may reasonably be drawn. 'If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.' . . . This

admonition should especially be kept in mind when the inferences which the parties seek to have drawn deal with questions of motive, intent, objective feelings and reactions." *Empire Electronics Co. v. United States,* 311 F.2d 175, 180 (1962).

Similarly, the Fourth Circuit has stated:

"It is only where it is *perfectly clear* that there are no issues in the case that a Summary Judgment is proper. Even in cases where the judge is of the opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a Motion of Summary Judgment which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented." *Pierce v. Ford Motor Co.,* 190 F.2d 910, 915, *cert. denied,* 342 U.S. 887 (1951). (Emphasis added)

Moreover, in determining arbitrability, it is recognized that "[t]he very nature of a collective bargaining agreement requires that it be read in the light of bargaining history and the history of the parties' own interpretations. A new technical rule of evidence which would render incompetent parol evidence of a party's intent would seem peculiarly inappropriate in the area of collective bargaining." *Communications Workers of America v. Pacific Northwest Bell Telephone Co.,* 337 F.2d 455, 459 (9th Cir. 1964) (footnotes omitted). *See also United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 570 (1960) (Brennan J., concurring) wherein it was stated that "[w]ords in a collective bargaining agreement * * * are to be understood only by reference to the background which gave rise to their inclusion." *Accord, Drake Bakeries v. Bakery Workers,* 370 U.S. 254 (1962).

3. The Defense of Laches Is an Issue for Court Determination.

The court below held that petitioner's defense of laches was an issue to be left to the arbitrator and not to be resolved by the court. This issue is the sole issue raised in a petition for writ of certiorari

filed with this Court on July 8, 1971 in an action entitled *"International Union of Operating Engineers, Local 150, AFL-CIO, Petitioner, v. Flair Builders, Inc., Respondent,* No. 71-41." The issue as posed by that petitioner was as follows:

> "Once the federal court has determined that a dispute is arbitrable under a collective bargaining agreement, must questions of delay in seeking arbitration, such as laches, be decided by an arbitrator rather than the federal court?"

Petitioner there claimed a direct conflict in the opinions of the federal courts of appeal in that the Sixth and Seventh Circuits had held the issue of laches is for the court, and the Third, Fifth and Ninth Circuits had held that questions of delay in seeking arbitration should be referred to the arbitrator. This Court granted certiorari on December 7, 1971. The instant case poses exactly the same issue, and we respectfully submit that it warrants review on that issue as well as the issues of the improper grant of summary judgment and the lower court's intrusion into the jurisdiction of the National Labor Relations Board in ordering that the parties litigate the issues anew before an arbitrator.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: March 17, 1972

Respectfully submitted,

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Appendix A

United States Court of Appeals for the Ninth Circuit

LODGE 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, AFL-CIO, *Plaintiff-Appellee,* vs. FRASER & JOHNSTON COMPANY, a corporation, *Defendant-Appellant.*	No. 25,234

[December 22, 1971]

Appeal from the United States District Court
for the Northern District of California

Before: MADDEN,* Judge, United States Court of Claims, CARTER, Circuit Judge and POWELL,** District Judge.

JAMES M. CARTER, Circuit Judge.

Fraser & Johnston Company (hereafter the "Company") appeals from a summary judgment against Lodge #1327 (hereafter the "Union") which compels it to arbitrate its dispute with the appellee Union. The suit was brought under § 301 of the Labor Management Relations Act of 1947 (LMRA), June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156, 29 USCA § 185(a), which authorizes federal courts to exercise jurisdiction over suits brought

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*Honorable J. Warren Madden, Senior Judge of the United States Court of Claims, sitting by designation.

**Honorable Charles L. Powell, United States District Judge, Eastern District of Washington, Spokane, Washington, sitting by designation.

to enforce collective bargaining agreements.[1] The appeal raises several issues: (1) whether the court's jurisdiction was pre-empted by the National Labor Relations Board; (2) whether there were genuine issues of material fact, so that summary judgment should have been denied; (3) whether the Union's delay or its failure to follow the grievance procedure caused it to lose its right to arbitration. We affirm.

Facts

The basic facts are not in dispute. The Company notified the Union that it planned to move its operations from San Francisco to San Lorenzo, and that it planned to lay off its San Francisco employees. The Union, taking the position that the collective bargaining agreement entitled the employees to employmnt at San Lorenzo, filed unfair labor practice charges with the National Labor Relations Board. That body has since found the Company guilty of unfair labor practices. *Fraser & Johnston Co.*, 189 N.L.R.B. No. 17 (March 31, 1971 Release).[3]

The Union also filed a complaint in the district court for injunction, damages, and declaratory relief. Later, when the Company refused to arbitrate, the Union amended its complaint to include a count seeking an order to compel arbitration. Upon a motion for summary judgment on this count, the district court directed the Company to proceed with arbitration.

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1. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined by this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a) (1970).

2. In its brief, the Company also alleges that the Union has failed to join an indispensable party, the International Brotherhood of Electrical Workers (I.B.E.W.). Since the time the case was before the district court, however, the I.B.E.W. has withdrawn its interest in the dispute and can no longer be considered an indispensable party.

3. Appellant's challenge to that decision is the subject of another proceeding before this court. *Fraser & Johnston Company v. N.L.R.B.* #71-1438.

Pre-emption

The Company contends that the NLRB has exclusive jurisdiction in this controversy. It relies on "the general principle that the National Labor Relations Act pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act." *Amalgamated Ass'n of St. El. Ry. & M. C. Emp. v. Lockridge*, 403 U.S. 274, 276 (1971); *accord, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

The pre-emption doctrine, however, is not without its exceptions. Not covered by the doctrine are suits brought under § 301 of the LMRA such as this one. *Amalgamated Ass'n of St. El. Ry. & M. C. Emp. v. Lockridge*, 403 U.S. at 297-301; *Carey v. Westinghouse Corp.*, 375 U.S. 261, 268 (1964); *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962). Such actions are judicially cognizable because, as the history of the enactment of § 301 reveals, "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'" *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513 (1962). "[Section 301] expresses a federal policy that federal courts should enforce these [arbitration] agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).[4] The district court, thus, had jurisdiction to compel arbitration.[5]

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4. Section 203(d) of the Labor Management Relations Act declares "[f]inal adjustment by a method agreed upon by the parties . . . to be the desirable method for settlement of disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d).

5. *United Ass'n of Journeymen & App. v. Foley* (9 Cir. 1967), 380 F.2d 474, relied upon by the Company, is inapposite. That case held that the district court did not *abuse its discretion* in staying the union's action pending NLRB adjudication where the NLRB trial examiner had already decided *against* the union. *Foley*, moreover, did not consider *Carey* or *Smith*.

Portland Web Pressmen's Union v. Oregonian Pub. Co. (9 Cir. 1960), 286 F.2d 4, *cert. denied*, 366 U.S. 912, also cited by the Company, predates *Smith* and *Carey* and deserves little weight.

The possibility of conflict with the Board is no barrier to resort to the arbitration tribunal. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964). Where arbitration has already taken place by the time a dispute reaches the Board, "the Board shows deference to the arbitral award, provided the procedure was a fair one and the results were not repugant to the Act." *Id.* at 270-71; *accord*, *International Harvester Co.*, 138 N.L.R.B. 923, 925-26 (1962), *enforced sub. nom. Ramsey v. N.L.R.B.*, (7 Cir. 1964), 327 F.2d 784; *Raley's Inc.*, 143 N.L.R.B. 256, 258-59 (1963); *Monsanto Chemical Co.*, 97 N.L.R.B. 517 (1951). And even where arbitration has not yet resulted in an award, the Board in some cases will leave the decision to that process. *Collyer Insulated Wire*, 192 N.L.R.B. No. 150 (1971).

The Company nevertheless maintains that this principle of deference does not apply in that the Board has already acted.[6] Whether deference is deserved, however, is largely within the discretion of the Board. *Carey v. Westinghouse Corp.*, *supra*; *International Harvester Co.*, *supra*; *Monsanto Chemical Co.*, *supra*, and we will not decide that question for them. If the arbitration

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6. The Union offers several policy considerations which, in its opinion, ought to govern accommodation between NLRB jurisdiction and the arbitral process. It argues that where the NLRB process has resulted in a decision, a court faced with a request to compel arbitration should consider:

> (1) Is the relief being sought in arbitration consistent with or in conflict with the NLRB determination?
>
> (2) Does the relief being sought in arbitration go beyond the relief granted by the NLRB?
>
> (3) Does the arbitration have different legal underpinnings than the NLRB proceedings, so that an arbitration result in favor of a party seeking arbitration could stand even if the NLRB decisions is not enforced?
>
> (4) What would be the practical impact upon the parties of the various alternatives available to the court?

We leave the evaluation of this list of considerations to future cases. We have no problem in establishing jurisdiction on the basis of well-recognized principles.

award goes beyond the Board's recent decision, as it indeed may,[7] the Board may, nevertheless, choose to follow the arbitration award. And were we to follow the course suggested by the Company, those who would prefer a Board decision would need only to stall the arbitration process. Such a result would undermine the federal policy in favor of arbitration.

Summary Judgment

The Company argues that summary judgment should have been denied in that there remained a genuine issue of material fact as to whether the collective bargaining agreement and its arbitration clause applied to the dispute in question. A determination of this question, it argues, requires an examination of the intent of the parties to the contract.

The controlling principles are clear. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

The arbitration clause is, without question, susceptible to an interpretation that covers the dispute. The clause Article XI, section 1 of the contract provides that grievances concerning the "interpretation or application" are matters for arbitration. A dispute as to whether the collective agreement applies to the San Lorenzo plant inherently requires the interpretation and application of the agreement. *See also General Warehouse & Emp. U. No. 636 v. American Hdwre. Sup. Co.* (3 Cir. 1964), 329 F.2d 789, 792-93.

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7. The NLRB decision grants full reinstatement at San Lorenzo of all bargaining unit employees, with back pay and recognition of the collective bargaining agreement as applicable to the San Lorenzo plant, *Fraser & Johnston Co.*, 189 N.L.R.B. No. 17 (March 31, 1971 Release). The relief which the Union is requesting in arbitration goes further in asking that all persons who have been employed at San Lorenzo be made whole for the difference between the wages and benefits received and the wages and benefits they should have received under the agreement.

Since there is no genuine issue of fact as to whether the arbitration clause is susceptible of an interpretation under which it covers the dispute, summary judgment was proper. The cases cited by the Company, which are said to hold that summary judgment is improper where there is a good faith dispute as to the intent of the contracting parties, are inapposite. These cases involve ordinary contracts.[8] A collective bargaining agreement is more than a contract; it is an attempt at self-government. In dealing with such agreements courts should not be preoccupied with principles which might apply to an ordinary contract. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

The Union's Failure to Follow The Grievance Procedure.

The Company contends that the Union failed to satisfy certain steps in the grievance procedure and in turn lost its right to arbitration. This, however, is a procedural question and the Union is entitled to arbitration as to it. Once it is determined that a dispute is arbitrable, procedural questions are for the arbitrator. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557-59 (1964).

The Company also argues that the Union's delay in requesting arbitration constituted laches, and that as such, it should have barred the Union's right to equitable relief. There is some question, however, whether laches is an appropriate defense to a suit seeking to compel arbitration of a grievance arising out of a collective bargaining agreement. Arguably, the question of laches is for the arbitrator.

Laches was not before the court in *John Wiley & Sons v. Livingston, supra*. The court did not rule out "the possibility that a union might abandon its right to arbitration by failing to make its claim known." *Id.* at 551. Subsequent circuit decisions have disagreed as to whether laches is a valid defense to a suit to compel arbitration or merely a question for the arbitrator. *See Tobacco Workers v.*

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8. *E.g. United States v. Kansas Gas & Electric Co.* (10 Cir. 1961), 287 F.2d 601; *Stevens v. Howard D. Johnson Co.* (4 Cir. 1950), 181 F.2d 390.

Lorillard Corp. (4 Cir. Sept. 16, 1971) ..... F.2d .....; *Operating Engineers, Local 150 v. Flair Builders, Inc.* (7 Cir. 1971), 440 F.2d 557, 560; *Clothing Workers v. Ironall Factories Co.* (6 Cir. 1967), 386 F.2d 586, 591.

We do not reach this question today, however, as we are of the opinion that the Company is not in a position to raise the defense. Laches was not raised or relied upon below. This is understandable in view of the record. There is no evidence to support a claim that the Union did not make its claim known; there is also no evidence of prejudice to the Company. The Union and the Company had bargained collectively on the question of the move for many months prior to the move. There is no suggestion on the Company's part that the Union did not make its grievance known at the time of its receipt of notice of the move or soon thereafter.

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1204

FRASER & JOHNSTON COMPANY, a corporation,
Petitioner,

vs.

LODGE 1327
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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Brief for Respondent in Opposition

The respondent, LODGE 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, opposes the Petition for Writ of Certiorari heretofore filed by FRASER & JOHNSTON COMPANY, and respectfully prays that the petition be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but is accurately reprinted in the Appendix to the Petition.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

In respondent's view, the first and second "questions presented" as stated in the Petition (p.2) are more accurately stated in a single question as follows:

> "Whether a party to a labor dispute who seeks relief concurrently through the National Labor Relations Board and the grievance and arbitration machinery of the applicable collective bargaining agreement is precluded from proceeding to arbitration by reason of the fact that the Board has decided portions of the dispute in its favor, under circumstances in which the other party is resisting enforcement of the Board's decision, and in which the relief sought in arbitration extends beyond the relief granted in the Board's decision."

The third question stated by the Petition (p.2) is more accurately stated as follows:

> "Whether summary judgment to compel arbitration as to the applicability of a collective bargaining agreement to a new plant is proper where the dispute involves the interpretation and application of the agreement, and the arbitration clause provides that grievances concerning "interpretation or application" are matters for arbitration."

The fourth question stated by the Petition (p. 2) is more accurately stated as follows:

> "Whether the Circuit Court of Appeals properly denied Petitioner's opposition to arbitration based on a claim of laches, where that claim was not raised or relied upon in the trial court, and where there is no evidence to support the claim."

STATEMENT OF THE CASE

Petitioner's statement of the case is accurate as far as it goes. The following additional facts may be helpful to the Court in passing upon the Petition:

1. The Petition states (p.3) that "Respondent failed to follow the grievance procedure called for in the collective bargaining agreement in that it did not comply with the four steps of grievance processing required as a prerequisite to arbitration". The facts are that the Respondent submitted a grievance to Petitioner, pursuant to the contractual grievance-arbitration procedure, and Petitioner promptly returned the grievance to Respondent, refusing to process it on the stated ground that the contract had terminated upon plant closing and that in any event it did not present an arbitrable issue. Respondent was thereby precluded from processing the grievance further, except with judicial aid.

2. The Petitioner has declined to comply with the NLRB decision in *Fraser & Johnston Co.* 189 NLRB No. 17, and the Board's Order in that case, rendered in March of 1971, is still pending for enforcement before the Ninth Circuit Court of Appeals. The actions of the Petitioner complained of in the Board proceeding and in the proposed arbitration proceeding began with layoffs of employees in May of 1969.

3. In the arbitration proceeding the Respondent is seeking relief which includes making persons employed at the Petitioner's new location whole for the difference between the wages and benefits received and the wages and benefits they should have received under the agreement. That relief appears to go beyond what the Board has ordered. (See Appendix to Petition, page 5, footnote 7).

ARGUMENT

All of the questions presented were properly decided by the Circuit Court of Appeals in accordance with prior decisions of this Court and of other Courts of Appeals. None of them presents novel issues compelling this Court's attention.

1. The Preemption Question.

In *Smith v. Evening News*, 371 U.S. 195 (1962), this Court held that federal jurisdiction over suits to enforce a collective bargaining agreement is unaffected by potential, or even actual N.L.R.B. jurisdiction. In *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), this Court applied the *Smith* principle to order arbitration of a dispute concerning coverage of a collective bargaining agreement even though the dispute (because it involved two unions) raised issues over which the NLRB might also have jurisdiction. The Court of Appeals correctly applied that principle to the instant case.

Petitioner would distinguish *Carey* on the ground that here "the Board has already decided the matter", and it lists a number of hypothetical situations in which conflict between the Board's Order and an arbitration award might arise. (Petition, p.8). Petitioner thereby ignores the fact that Respondent has rights under its collective bargaining agreement which are, to some extent, independent of its rights and the rights of employees under the National Labor Relations Act. Certainly an arbitrator knowledgeable in labor relations matters will pay due deference to the Board's decision, and if he fails to do so a court may decline to enforce the award. Respondent should not lose the right to relief premised upon the agreement, or the right to additional relief not encompassed within the Board's remedies, simply because Petitioner has successfully resisted arbitrating until after the Board's decision.

2. The Propriety of the Summary Judgment.

Petitioner attacks the Summary Judgment as improper because there existed material questions of fact as to whether the collective bargaining agreement was intended to apply to petitioner's new plant. But application of the

agreement to the new plant lies at the core of the issues to be arbitrated. To argue that the Court should determine that issue on its own is equivalent to arguing that it should not go to arbitration at all. In light of the contract language which makes disputes over "interpretation or application" matters for arbitration, that argument is clearly contrary to the teachings of this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In any event, the Labor Board has determined the issue of contract applicability in favor of Respondent, and the Court as well as an arbitrator would be bound by that determination on the basis of *Carey v. Westingtouse Electric Corp.*, 375 U.S. 261 (1964).

3. The Defense of Laches.

Petitioner seeks to invoke this Court's certiorari jurisdiction on the ground that the case involves an issue presently pending before the Court on a grant of certiorari, as to whether questions of delay in seeking arbitration, such as laches, should be decided by the Court or by an arbitrator. But the Court below expressly found it unnecessary to decide that issue for two reasons: first, because laches was not raised or relied upon in the trial court; and second, because there was no evidence to support the claim. The petition for certiorari states no facts in contradiction of those findings.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 12, 1972.

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Respondent.

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Respondent.

Reply of Petitioner

Petitioner, FRASER & JOHNSTON COMPANY, submits the following in reply to respondent's opposition and as a supplement to its petition and respectfully prays that the petition be granted.

I.

THE PRE-EMPTION QUESTION

Respondent attempts to meet the argument that arbitration after the National Labor Relations Board has already decided the issues to be placed before the arbitrator will almost inevitably result in incompatible or conflicting adjudications for which there are no means of reconciliation by suggesting that "[a]n arbitrator knowledgeable in labor relations matters will pay due deference to the Board's decision, and if he fails to do so a court may decline to enforce the award." (Brief of respondent, p. 4) However, as pointed out in the petition (p. 8 particularly in note 2), court confirmation of an arbitral award is mandatory absent fraud, corruption, partiality, misconduct, misbehavior, or an act in excess of the arbitrator's powers. Thus, petitioner's arguments have not, in any way, been met.

Since the petition herein was filed, a decision by the Appellate Division of the New York Supreme Court was reported in 328 N.Y.S. 2d 939—*Borden, Inc. v. Local 50, Bakery Workers* (Feb. 18, 1972). There the court affirmed an order denying a motion to stay arbitration pending the determination of a federal court action for a declaration that the dispute in issue was not subject to arbitration but was a matter within the exclusive jurisdiction of the National Labor Relations Board. The court affirmed because the request for a stay was premature.

> "Until the 'moment of conflict' between the arbitral process and an N.L.R.B. determination arrives, by virtue of N.L.R.B.'s invocation of its paramount authority by force of its pre-emption of the field of dispute, there can be no valid basis for granting the requested stay (see Matter of Meyers [Kinney Motors], 32 A. D. 2d 266, 72 LRRM 2064). In the instant case, the request is premature."

In petitioner's case, the "moment of conflict" has arrived. The Board has not only asserted its paramount authority by force of its pre-emption of the field, but under that authority has acted. The New York Appellate Court indicates that in such a situation, it would stay arbitration.

This most recent case not only recognizes the preeminence of the National Labor Relations Board, but also is clear evidence of the conflict between and among the federal and state courts in this very important and critical matter. Review by this Court is the only means by which this matter can be given the definition and clarity that it deserves.

II.

THE DEFENSE OF LACHES

Respondent notes that the Court below opined that the issue of laches was not raised in the trial court. However, the record will show that the issue was raised by petitioner and argued in its memorandum in opposition to respondent's motion for summary judgment. On pages 7-9 of petitioner's memorandum of

points and authorities in opposition to motion for summary judgment (Record pp. 261-63) it stated,

> "As set forth in the affidavit of Tom A. Leen, the alleged grievance was never taken up with [petitioner] as required by Article XI of the collective bargaining agreement under which [respondent] seeks to compel arbitration. None of the steps in the grievance procedure as specified in said Article XI ([respondent's] Exhibit "A" to Leen's affidavit) preceding the arbitration provision were pursued or undertaken by [respondent]. Assuming, *arguendo,* that said collective bargaining agreement is in force, [respondent] being a party to it and relying on it, must first comply with the grievance steps before it can seek arbitration."
>
> ***
>
> [Respondent], as set forth in Leen's affidavit, has not complied with the grievance steps in the contract (Art. XI). Having failed to so comply, it is not in a position to pursue arbitration."

Thus, the court below and respondent were in error, the issue of laches was before the trial court and the decision of the court below does indeed pose the same question as was posed in the case of *International Union of Operating Engineers, Local 150, AFL-CIO, Petitioner v. Flair Builders, Inc., Respondent,* No. 71-41. Certiorari was granted in that action on December 7, 1971. The instant case poses exactly the same issue and should similarly be entitled to review by this Court.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Dated:

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